Geographies of Families in the European Union:

A Legal and Social Policy Analysis

Authors: Manuela Naldini and Joëlle Long

Document Identifier

D9.8 article submitted to a peer-reviewed journal on a cross-national study on family and reproductive rights of men and women living in diverse family The journal to be submitted: the International Journal of Law, Policy and the Family (Oxford Journals).

Version

1.0

Date Due

30.04.2016

Submission date

29.04.2016

WorkPackage

9 Balancing Gender and Generational Citizenship

Lead Beneficiary

16 UNITO

Dissemination Level

PU

Grant Agreement Number 320294
SSH.2012.1-1
### Change log

<table>
<thead>
<tr>
<th>version</th>
<th>Date</th>
<th>amended by</th>
<th>Changes</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.0</td>
<td>29.04.2016</td>
<td>Manuela Naldini and Joelle Long</td>
<td>Final paper delivered</td>
</tr>
</tbody>
</table>

### Partners involved

<table>
<thead>
<tr>
<th>number</th>
<th>partner name</th>
<th>People involved</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>UU</td>
<td>Trudie Knijn</td>
</tr>
<tr>
<td>3</td>
<td>UNIZG</td>
<td>Josip Sipic</td>
</tr>
<tr>
<td>6</td>
<td>AAU</td>
<td>Anita Nissen</td>
</tr>
<tr>
<td>12</td>
<td>CEU</td>
<td>Katalin Amon</td>
</tr>
<tr>
<td>14</td>
<td>HUJI</td>
<td>Dana Halevy</td>
</tr>
<tr>
<td>16</td>
<td>UNITO</td>
<td>Joelle Long, Manuela Naldini, Arianna Santero, Rosy Musumeci</td>
</tr>
<tr>
<td>18</td>
<td>UNIOVI</td>
<td>Ana Rosa Argüelles Blanco and Luis Antonio Fernández Villazón</td>
</tr>
</tbody>
</table>
# Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXECUTIVE SUMMARY</td>
<td>4</td>
</tr>
<tr>
<td>I. INTRODUCTION</td>
<td>5</td>
</tr>
<tr>
<td>II. FAMILY AT A NATIONAL LEVEL: A SHIFTING CONCEPT</td>
<td>6</td>
</tr>
<tr>
<td>1. Explicit and implicit definitions</td>
<td>6</td>
</tr>
<tr>
<td>2. The Horizontal Line of the Notion of Family: Marriage, Registered Partnership and de facto Cohabitation</td>
<td>8</td>
</tr>
<tr>
<td>3. The Generational Line in the Notion of Family: &quot;Parentage&quot;</td>
<td>10</td>
</tr>
<tr>
<td>III. THE ROLE OF EUROPE</td>
<td>12</td>
</tr>
<tr>
<td>IV. THE CASE OF CROSS-BORDER “REPRODUCTIVE CARE”</td>
<td>14</td>
</tr>
<tr>
<td>V. CONCLUSIONS</td>
<td>17</td>
</tr>
<tr>
<td>VI. POLICY IMPLICATIONS AND LINK TO OTHER BEUCITIZEN DELIVERABLES</td>
<td>19</td>
</tr>
<tr>
<td>REFERENCES</td>
<td>21</td>
</tr>
<tr>
<td>ANNEX 1: QUESTIONNAIRE 9.8 DIVERSE FAMILY FORMS AND REPRODUCTIVE RIGHTS</td>
<td>27</td>
</tr>
<tr>
<td>ANNEX 2: PROOF OF SUBMISSION TO PEER REVIEWED JOURNAL</td>
<td>32</td>
</tr>
</tbody>
</table>
**EXECUTIVE SUMMARY**

This deliverable (9.8) is an article submitted to the *International Journal of Law, Policy and the Family* (Oxford Journals) which analyses the notion of family in the EU and family reproductive rights in a group of EU member states with different legal, cultural and social backgrounds (Italy, Spain, Denmark, the Netherlands, Croatia and Hungary). The article combines a sociological and legal approach and is based on a questionnaire completed by the partners involved in the task (see Annex I).

The social and legal changes in the geographies of families in Member States encourage the European Union to reconsider its traditionally prudent approach to family law. Indeed, the free movement of people, an essential characteristic of European citizenship, requires legally established family statuses to be ‘portable’ abroad. Similarly, marriage and reproductive mobility arising from the variety of national regulations force domestic legislatures and courts to challenge the definitions of family found in domestic law and social policy in the name of the right to family life and the principle of non-discrimination. Thus, this article starts by discussing the various notions of family that emerge from national laws and social policies in six EU member states with different legal, cultural and social backgrounds (Italy, Spain, Denmark, the Netherlands, Croatia and Hungary). It then delineates the role of Europe and the social and legal interactions between Member States in the construction of a definition of family. Finally, it concentrates on cross-border reproductive care, a case study that allows for shedding light on the convergences among countries, as well as the role of Europe as a supra-national institution and as a space in which family models circulate and spread. The main conclusion is that a multilevel analysis of the notion of family shows the circularity of interactions top-down and bottom-up between Europe and individual States, as well between society and law.
I. INTRODUCTION

Families and living arrangements in Europe have changed dramatically since the mid-1960s. The factors that have contributed most to this transformation are the decrease in marriage and the increase in cohabiting couples, the growing visibility of homosexual unions and LGBT parenting, the postponement of couple formation and childbearing, and the decline in fertility. The rise in marital instability and the disconnection of marriage, sex, and reproduction has been observed throughout Europe and has brought about the spread of one-parent families and people living alone (see Kuijsten, 1996; Billari, 2005; Prioux, 2006; Sobotka and Toulemon, 2008). In addition to that, the decline of the male breadwinner family model, based strongly on an unbalanced gender division of labour (Lewis, 2001), resulted in the reduction of social rights related to being a family member (Lewis and Giuliani, 2005; Daly and Scheiwe, 2010) in favour of EU policies supporting "self-responsibility" (Frericks, 2010) of the "adult worker" (Jenson, 2008). Indeed, the leading ideas are the ability of all individuals (women and men, mothers and fathers) to be employed, and the "individualization" of social rights.

More generally, the meaning of family and family life has undergone a profound change. Intimate partnerships and sexuality, as well as the relationships between parents and children, have moved away from the realm of normative control and institutional regulation, giving rise to the new ideal of reflexive 'pure relationships' based on mutual consent and the recognition of individual autonomy (Giddens, 1992). Alternative partnership forms and living arrangements other than the married and/or heterosexual family are being acknowledged by EU countries. The same is happening with Assisted Reproductive Technologies (ART), including surrogacy arrangements. This variety of legal regulations have become reasons for marriage and reproductive intra- and extra-European mobility posing new questions about the idea of EU citizenship and family. In fact, the free circulation of people, an essential characteristic of European citizenship, requires that rights be 'portable', and therefore also family situations that are legally established in other countries of the Union (Baratta, 2004: 213).

The goal of this paper is to reflect on the notion of 'family' in the light of change in family patterns and of the impact that Europe has had on it. By Europe we mean not just the European Union, but also the plurality of states that have social, cultural and legal interactions among themselves ‘from the bottom up.’ To identify the notion of ‘family,’ we need to go beyond declamations of principle that are sometimes found in laws and regulations, and look instead concretely at the nucleus whose components are recognized by the State as having the right to be treated differently and with privilege. Thus, we will illustrate how and if the various forms and ways of experiencing and understanding family are supported through social policy, as well as recognized in civil law (which focuses essentially on the access to marriage or registered partnerships, assisted reproduction treatments, child adoption and in particular the possibility of adopting a partner’s offspring), labour law, social policies and social welfare and immigration law.
This article is part of the multidisciplinary European project, bEU Citizen, that has the goal of clarifying and analysing the barriers that still exist to achieving and exercising citizenship rights for EU citizens. The information used for this article was gathered through a semi-structured questionnaire submitted to experts in the various countries involved in the study. The questionnaire had three main goals: 1) to understand if and how ‘family’ is defined both in family law and social policies in the various countries involved, and how convergent (or divergent) the notion of family is for the fields of law and social policies; 2) to determine what relationships legally constitute a ‘family’ within the changing family context; 3) and whether there are explicit bans on granting legal status as a ‘family’ to specific relationships, identifying the barriers faced by ‘different family forms’ such as unmarried couples, same sex marriages and rainbow families, when living, moving or travelling within the European Union.²

Six European countries considered to be representative of different family law and social policy models were included in the analysis: Denmark and the Netherlands, in that they are countries with a long tradition of being open to alternative family models to the traditional married heterosexual couple; Hungary, Croatia and Italy, which continue to be relatively traditional countries when it comes to families; and Spain, that while belonging to a Mediterranean model of family and welfare state (Naldini, 2003) characterized by a sort of “family-ism by default” (Saraceno and Keck, 2011), has over the past decades revolutionised its own body of regulations and adopted a more open approach toward new family models.³

Thus, in the following sections, we will examine the various notions of family that emerge from the national laws and social policies in six EU member States (part II); the role Europe has played in construction of the notion of family (part III); and finally, we will concentrate on a case study, the case of cross-border reproductive care that allows for shedding light both on the convergences among countries (or the lack thereof), as well as the role of Europe not only as a supra-national institution, but also as a space in which family patterns circulate and spread (part IV).

II. FAMILY AT A NATIONAL LEVEL: A SHIFTING CONCEPT

1. Explicit and implicit definitions

A comparative analysis of the notions of family in Denmark, Hungary, Croatia, Italy, the Netherlands and Spain shows, first of all, that the attempts to make a general definition of family are very few and that the most recent among them try to programmatically exclude certain groups from the notion of family, primarily homosexual partnerships.

The comparison of constitutions is emblematic. The fundamental laws of the Netherlands and Denmark do not contain any reference to the family. On the contrary, the constitutions of Spain, Italy, Croatia and Hungary explicitly state the obligation of the State to protect this social nucleus.⁴ The Spanish Constitution nevertheless ascribes the concept of family to the fact of procreation, therefore excluding the importance of
the existence of a bond of marriage (Martinez Lopez-Muniz, 2000: 4). Instead, the Italian Constitution (1948), the Hungarian Constitution (2011) and the Croatian Constitution (modified in 2013) seem to trace a parallel between ‘family’ and ‘marriage’. Article 29 comma 1° of the Italian Constitution in fact explicitly states that: “the Republic recognizes family rights as a natural society founded on marriage”. However, the interpretation which has emerged over time is that the constitutional provision obliges the legislature to protect the marital family as it was then regulated in the Civil Code (i.e. heterosexual marriage between homosexual partners), without excluding the possibility of granting protection to other family models. In Hungary and Croatia, the provisions of law are much more recent (2011 and 2013 respectively) and they carry out a precise political desire of the conservative wing to make the heterosexual nature of marriage a part of the constitution, and thus conceive this as the foundation of the family.

The Croatian case is of special interest: the recent definition of marriage as a heterosexual union was inserted into the Constitution following a referendum which was tellingly called “In the name of the family”\(^8\). To date, nevertheless, no direct impact was recognized in a preclusive way for the juridical significance of other family models not founded on marriage. Precisely in reaction to the introduction of a constitutional covering of the heterosexuality of marriage, the Parliament passed the Life Partnership Act on July 15, 2014, that attributes rights that are substantially analogous to those of married couples to partners whose status of co-habitation is registered. One cannot exclude, however, that these constitutional norms risk also playing a cultural role that is contrary to a further broadening of the rights of “new families”, specifically in the official recognition of rights among heterosexual and homosexual couples that live together.

In the ordinary legislation of the various countries, several other definitions of ‘family’ emerge that are formulated with reference to specific contexts of regulation or intervention. For instance, a first explicit definition of "family" is the one used by statistics offices, very often for census purposes, to indicate the residential unit. In most countries, statistics offices clearly distinguish the family (and families) from the household (and households). For statistical purposes, the Croatian census used the following definitions of household and family: “Household is considered to be any family or other union of persons living together and spending their income together to meet basic living needs (housing, food and similar), i.e. of a person who lives alone and does not have a household in another settlement in the Republic of Croatia or abroad (single households)”. Family, according to the Croatian Statistics Office, has to be referred to as “a narrower family union within the same household consisting of: parents (both or one) and their children who are not married (in a legal or extra-marital union), husband and wife without children or a man and a woman living in an extra-marital union.” Statistics in Denmark define a family as “one or more persons who live at the same address and have certain mutual relations. A family can consist of a single person or a couple with or without children younger than 25 living with them.” According to the same office, differently from the family as mutual relations between one or more persons, “A household contains all persons at a given address, regardless of the relationships between them. Households are calculated on a type basis and size.” Generally speaking, for statistical purposes, almost all countries distinguish between family and household.
Denmark, Hungary, Croatia and Spain adopt a definition of household (as housekeeping unit or as "household dwelling" unit) separate from the family as such. The Netherlands is an exception, since there is no census (since 1971) and the definition of household varies per administration. Italy is an exception too, since it is the only country where the boundaries between household and family are blurred. As a matter of fact, individuals are identified as household members only if they are living under the same roof and are related by blood, marriage, or are a couple. According to the Italian Office of Statistics, a family as a unit of residence is as follows: "a group of people linked by bonds of marriage, kinship, affinity, adoption, legal guardianship, or emotional bonds, people living together and who have the same habitual residence in the same town. A family may be composed of one single person."

Differences in the notion of family and family structure in the six countries considered continue to be marked, even when adopting the definition of the family unit as the "married family nucleus" (as recommended by the UN, 1987). According to this recommendation, the family nucleus is made up of married or unmarried couples with or without children, with the children understood to be of any age, married or unmarried. In all the countries considered, in the definition of family nucleus there is no age limit; but in Denmark the statistics office considers only children up to the age of 25 part of the family.

In the majority of cases and even within the same country, nevertheless, the definitions of ‘family’ are implicit. That is to say, the state and local authorities for reasons of particular moral or social value (for example, support for early childhood and large families, promotion of reconciling family life and work outside the home, support for the childbirth) recognize certain civil and social rights (access to marriage/civil union, adoption, inheritance, family reunification, money transfers, tax credits, services, access to medically assisted reproduction) or obligations. In the language of the European Convention on Human Rights, these rights can be included in the broader individual right to respect for family life. 10

Within the parameters of the present study, we will now consider the principal notion of family that emerges from the analysis of the interwoven relationships among various legal forms of recognition and regulation of family relationships in the selected countries. We will then focus on the way in which the state intervenes in economic terms to support recognition of time for taking care of the family, such as parental leave, and social public services for childcare and family obligations and responsibilities.

2. The Horizontal Line of the Notion of Family: Marriage, Registered Partnership and de facto Cohabitation

In all the countries considered, the juridical relationship of marriage/registered partnership “merits special treatment,” and therefore leads one to presume that there actually is a family deserving protection in the accepted meaning proposed above. When it is demonstrated that cohabitation and other factual indicators are concretely lacking, this constitutes an exception, in spite of the juridical relationship. A typical example is the marriage of convenience for acquisition of nationality or for family reunification. 11
However, legislation related to marriage and registered partnership shows substantial differences among the six countries in the way in which the civil, social and economic rights to diverse family forms are acknowledged and in the way in which citizenship can be practiced as a family member. In the Netherlands, Denmark and Spain12, where spouses may be of the same sex or not, and where registered partnerships exist, there is almost no gap between civil acknowledgment and social rights among married couples and registered unions whether of the same sex or not.

On the other hand, there is the Italian example, where neither registered partnerships nor marriage for same sex couples are possible (although there is currently a bill pending which proposes the introduction of civil unions, waiting for final approval). Heterosexual couples living together also have minimal civil and social rights and no access to reproductive rights or to "parentage". Partners can regulate the relationship only within the scope of their private autonomy by contract. Hungary and Croatia are in a halfway position, since both countries have recently introduced registered partnerships.13 But, as we will see, in both countries same-sex couples are completely excluded (in Hungary) and/or have very limited opportunities to claim access (in Croatia) to assisted reproductive technologies, and adoption for same-sex couples and for singles is banned.

In the case in which marriage or registered partnerships are lacking, the existence of a family is anchored exclusively to factual data, first of all living together, or sharing of resources. The weight of the burden of proof varies according to the country and also within the individual country, according to the context of reference. More generally, there doesn’t seem to be an unambiguous or single trend among the various countries, and even within one single country among the different areas of law and policy. For instance, factual data and definition of family understood as a unit of residence and more often as a “conjugal unit,” independent from the form of partnership, is what is assumed as a notion of family, in the case of services that are means-tested based, as in the case of social welfare services.

The factual data is however less cogent when access to social security benefits or other family benefits are involved. In effect, even in countries where the legal differences between spouses, heterosexual and homosexual married people, registered partnerships and cohabitants are very few – like in Denmark where most laws focus on individual rights rather than on the protection of the family unit, since the reciprocal dependency duty (gensidig forsørgelsespligt) was abolished in the 1970s – rights are not fully equal. For instance, in Denmark couples that live together without children have no automatic inheritance rights. Moreover, with early retirement pensions, there may be some difference in the supplements to the pension. Similar situations are found in the Netherlands and Spain, where civil and social rights for different forms of family are almost but not fully equal. In Spain, the surviving partner in an unmarried couple that lived together holds the same right to a full survivor pension as a married survivor does only on a means-tested basis. Furthermore, in Spain married couples may opt for joint taxation if it is more beneficial, while unmarried childless couples living together in a registered union may not; unmarried couples with children may also file joint tax returns. Unlike a spouse, a cohabitant partner is not taken into account in determining the amount of unemployment benefits (Moreno Gené, 2010).
However, in countries where marriage for same sex couples does not exist, like in Hungary, Croatia and Italy, and/or where a law on living together does not exist, like in Italy\textsuperscript{14}, differences in benefits among various types of family forms are broader, as is to be expected. In countries where same-sex marriage and registered civil unions are legal, benefits do not vary as much, especially as relates to the couple and in particular social insurance (i.e. survivors’ pension), taxation and family welfare. In Hungary, even if family-related social benefits and allowances are linked to childbearing and to the number of children and not to the form of partnership, like in most countries, only married and registered couples can apply for the four kinds of childcare benefits. In Croatia, different family forms are treated differently as regards inheritance laws and pension law. The Inheritance Act\textsuperscript{15} and the Civil Obligations Act\textsuperscript{16} provide different definitions of extramarital unions as compared to the Family Act\textsuperscript{17} and other relevant regulations, thus opening a space for different interpretations and practices when it comes to the exercise of rights for unmarried couples. Although the Inheritance Act includes an extramarital partner in the list of legal heirs, its definition of extramarital union as “a life union between an unmarried woman and an unmarried man that lasted for a longer time” leaves it to the competent body (court or public notary) to decide on this matter according to the case law of Croatian courts. The same is the case with the Civil Obligations Act when it comes to an extramarital partner exercising the right to gain fair financial compensation in case of a death or severe disability of the insured person, since the competent body has to determine the existence of “a more permanent life union” between the cohabiting partners. Moreover, in Croatia, to exercise the right of pension upon the death of an extramarital partner, it is necessary to prove the existence of the extramarital union in a legal action.

3. The Generational Line in the Notion of Family: "Parentage"

As regards recognizing access to ART and more broadly recognition of rights linked to ‘parentage,’ to diverse family forms, the six countries considered have very different legislation and regulations. On the one hand, Denmark, the Netherlands and Spain allow both singles and lesbian couples access to assisted reproduction. On the other, Italy, Hungary and Croatia do not allow couples of two women access to assisted reproduction technologies (with the exception of Croatia that allows it for same-sex unions with a medical history of infertility - Act on Medically Assisted Fertilization, Article 10).\textsuperscript{18}

As regards regulations for access to adoption for different forms of family, there are broad differences among the various countries, as there are with regard to cross-border reproductive care. In particular, a distinction must be made between countries that allow adoption for people of the same sex (Netherlands, Spain and Denmark, even if the latter allowed adoption even before homosexual marriage for couples that had a registered partnership), and countries that, on the other hand, limit or prohibit adoption for couples of the same sex (Croatia, Hungary and Italy).

In the majority of European countries, policies that help families with children – whether the policy is
explicit or implicit, universalist or selective – tend to support family responsibilities rather than the family as an abstract entity, and do so through the transfer of resources (direct or indirect), through legislation for mothers or parents that work, or through services for children and frail elderly or the disabled (Kahn and Kamerman, 1994; Gauthier, 1999; Bahle and Pfenning, 2000). But which family relationships are recognized and supported with public resources and which family model is assumed and supported by social policies doesn’t depend only on changes in the family. It depends on how public and private family responsibilities were legally defined in legislation and social policies regarding the needs of economically dependent individuals on the basis of age, generation, gender and degree of kinship. Furthermore, it is determined by the transformations and adjustments that more fully affect the “European social model” as well as the transformations that starting in the ’90s affected all the national welfare states in Europe.

In the last two decades, most European welfare states have tried to readjust old welfare programs to new social risks. New policy paradigms, "activation policies" and "social investment" (Ferrera and Rhodes, 2000; Esping-Andersen et al., 2002; Hemerijck, 2015; Saraceno 2015), have further stressed the relevance of individual responsibilities and individual social rights (Daly and Scheiwe, 2010) while at the same time expanding family policy. In this direction, EU level policy has had a central role, emphasising the need to increase employment for all, but especially parents’ employment (i.e., maternal employment) and encourage the enhancement of early childhood education and care policies (Jenson, 2008; Morgan, 2013, Ferragina and Seeleib-Kaiser, 2015). However, the multivalent and very different character of family policy (Kamerman and Kahn, 1994), the different national policy legacies (Gauthier 1999), and the variable nature of relationships between the family and the welfare state is evident by simply looking at the very different level of public expenditure on family benefits and the different degree of increase in enrolment rates of small children in day care services (OECD family database). The differences among the six countries’ legislation on parental leave and paternity leave in term of entitlement, length, flexibility, and compensation rate are all evidence that harmonization in legislation is not near.

Different traditions of social policy and divergent paths in recent policies for families with children seem to indicate greater importance for individual responsibilities and rights within the couple and stronger emphasis on family policies which support the “adult worker model”. Thus, it is interesting to analyse to what extent and in which countries the alternative family forms such as de facto cohabitants, registered partnerships, same-sex couples, and rainbow families are included or excluded from the formal and practical notion of family.

So far, the analysis of the notion of family in the six national contexts shows that the formal definition of family and family member as found in the Constitution, in civil law, or for census purposes is not always consistent with the social rights granted to individuals as family members. A reduction in social rights, both in the law and in citizenship practices, and in individualization of social rights related to being a family member is more evident in the horizontal line of family for those who are in a partnership that is not legally formalized.
This is less so in terms of granting social rights, i.e. family benefits, in the vertical dimension of the family, that is to say, in the generational line of the family. However, the family status of children and parents remains more undefined in civil law for alternative family forms and in this case tends to privilege the factual data with respect to that of formalization.

Do any discrepancies emerge between the variable notion of family within its vertical and horizontal lines on a national level, the EU level and/or supranational level?

**III. The Role of Europe**

The disorganized and fragmentary nature, as well as the lack of balance in the national levels, requires paying special attention to the European level. Without a doubt, it is true that the close ties of family matters with the social and cultural context of the various countries and the correlated lack of consensus among the various legal codes as to what are the proper relationships that constitute a ‘family,’ has traditionally led the European Court of Human Rights and the European Union to avoid making defining declarations of principle and to adopt instead a prudent and pragmatic approach based on case law, thus preferring to defer to the national civil jurisdictions.\(^{21}\) Up until 2010, for example, the European Court of Human Rights dealt with questions regarding partners of the same sex from the point of view of individual rights and respect for private life. In EU law due to the particular sensitivity of the topic and the role of national traditions and cultures in this field, a special legislative procedure that requires unanimity is provided for the adoption of ‘measures concerning family law with cross-border implications’.\(^{22}\) The Directive 2004/38/CE on free movement of people includes, among family members, “the partner who contracted a registered partnership with the EU citizen on the basis of legislation of one member state” only “if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State”\(^{23}\). Moreover, EU Regulation n. 1259/2010 provides that “Where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the forum shall apply”\(^ {24}\) and that “Nothing in this Regulation shall oblige the courts of a participating Member State whose law does not provide for divorce or does not deem the marriage in question valid for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation”.\(^ {25}\) In recent judgments, the European Court of Justice held to be in compliance with EU law the refusal by national courts to extend the right of maternity leave to women who had a baby through surrogacy.\(^ {26}\) According to the European judges, this fact did not constitute discrimination based on sex nor on handicap, and therefore did not violate EU law.

In any case, over the past fifteen years, both the European Court for Human Rights and EU law have in fact substantially reduced the autonomy of national jurisdiction in recognizing ‘other’ types of family forms...
with respect to the traditional model of a heterosexual married couple with children that are biologically the children of both partners.

While not always finding favour in nationalistic and ultra-nationalistic political currents, the activity of the EU has worked in the direction of favouring different family forms. This has happened with the declared intention of assuring respect of fundamental rights and liberties, and also as a consequence of the progressive consensus, or at least of a trend, among the legal systems of Member States.

Moreover, as is known, the European Court for Human Rights came to confirm the existence of ‘family life’ deserving of protection for same-sex couples precisely because of the convergence of domestic laws in recognizing the civil and social rights of this relationships: in this sense the copious comparative references contained in the leading case of Schalk and Kopf v. Austria of June 24, 2010 must be understood.

In fact, the principle of non-discrimination has been playing a major role in this evolution both in Strasbourg and in Luxemburg case law. According to what is by now the consolidated case law of the European Court of Human Rights, the margin of appreciation on the part of the Member States in case of differences in treatment based on sex and sexual orientation is today to be kept extremely reduced. On its side, the Court of Justice in the judgement K.B. v. NHS Pensions Agency affirmed that a national law that prevents a couple from satisfying the condition of marriage, necessary so that one of the partners may enjoy an element of the other’s retribution, must be considered ‘along the lines of principle, incompatible with’ the EU provision on equal pay between men and women. More recently, the freedom of movement of European citizens within Europe was taken as the legal basis for the duty of Member States to recognize the parental right to give children a surname lawfully formed according to the laws of the State with which the family has a close connection. Moreover, there have been legislative actions aimed at ensuring the portability of family status, namely parental responsibility and the existence of a divorce, legal separation or marriage annulment (Reg. 1347/2000 and Reg. 2201/2003).

It is exactly the idea of belonging to a shared space of freedom and justice that is invoked when discussing and debating the right to the recognition of marital status lawfully acquired in a EU country, but in violation of the law of the country of origin, which is usually also the country of habitual residence (Baratta, 2004: 4). This is the phenomenon of the so-called ‘matrimonial tourism’, that is to say, temporary expatriation with the aim of creating a bond of a marriage contract for same-sex couples whose national laws prohibit any method for formalizing the relationship of that couple. In fact, in the case in which domestic law (as happens in Hungary and Croatia) provide for registered cohabitation with contents that are substantially analogous to marriage, couples don’t have a substantial interest but potentially only a symbolic interest in marrying abroad. Thus, in the European Union, ‘marriage tourism’ today regards essentially Italian, Polish, Lithuanian and Romanian same-sex couples. Even if these countries are (still) prevalently contrary to recognizing homosexual marriages celebrated abroad by their citizens, belonging to the European Union is invoked by
many parties in favour of acknowledging these unions. Being part of the EU should in fact demonstrate shared principles and values, among which the principle of non-discrimination on grounds of sexual orientation, the right of same-sex couples to respect for family life (ECtHR, June 24, 2010, Schalk and Kopf v. Austria) and specifically, to the formalization of their relationship as a couple (ECtHR, June 27, 2015, Oliari v. Italy), as well as the freedom of circulation within the confines of the Union. Lastly, the so-called Lunacek report, which outlines a schedule “against homophobia and discrimination, linked to sexual orientation and gender identity”, urges Member States to recognise, in accordance with EU rules, all forms of marriage, partnership and parenthood contracted elsewhere by those resident or working within their borders, and calls on the Commission to take action against Member States that fail to comply.

**IV. The Case of Cross-Border “Reproductive Care”**

The differences among Member States in the way in which one becomes a parent, (for instance the legal limits of access to ART and adoption, but also waiting time and costs) constitute the reason for the existence of the phenomenon which goes under multiple names, such as “reproductive tourism,” “reproductive exile” or “cross-border reproductive care” (CBRC) (Shenfield et al., 2010; Harpenter et al., 2010; Prag and Mills, 2015). The situation is not new: one has only to think of the recourse to inter-country adoptions prior to the introduction in various countries of organic laws on the subject. Moreover, surrogacy itself predates modern times and is known in different cultures as a way to overcome individual infertility (Peet, 2016).

In Europe, cross-border reproductive care is widespread, first of all because Europe has the largest number of Assisted Reproductive Technology treatments; second, because “baby economy” is booming (Peet, 2016) and very few babies are available for national adoptions. Besides, in the majority of European countries’ legislations, commercial surrogacy is prohibited, while an increasing number of surrogate mothers from third world countries have become a hot commodity for westerners looking to have children. Despite this, there is little empirical evidence and the data on this phenomenon is quite limited (Hudson et al., 2011, Harper et al., 2013; Prag and Mill, 2015).

As far as donor insemination is concerned, among the countries that are the subject of our analysis, two appear particularly interesting: first of all, Italy and then with smaller numbers, Croatia. In Italy, in fact, access to ART is reserved for heterosexual couples (Art. 5 law n.40/2004); moreover, until 2014, heterologous artificial insemination was forbidden. This was then declared constitutionally illegitimate by the Constitutional Court with decision 162/2014. But, two years later, donor insemination is still not widespread because of the low number of donors and high cost. In Croatia, the law was reformed in a more liberal sense (in 2012), but does not seem to have substantially decreased the volume of procreative ‘tourism’, in consideration of the persistent lack of a sperm bank for artificial insemination.
A second example of cross-border reproductive care is surrogacy or gestation by others (GPA, *Gestation pour autrui*, in the technical language of the European Court of Human Rights), chosen by heterosexual couples or gay couples. The majority of countries that are the subject of our research forbid this technique. Only the Netherlands and Denmark allow it, if there are no costs for mediators and the pregnant mother only receives reimbursements (so-called altruistic surrogacy). Furthermore, in the case of the Netherlands, the law explicitly provides for the impossibility of obtaining the enforcement of the surrogacy arrangements against the surrogate mother, who is the legal mother and whose name must in any case appear on the birth certificate.

Case law shows in any case that it is not infrequent that Dutch couples go abroad for surrogate births, given the strict limits of their national law (European Parliament, 2013: 311). In Denmark, in the case of cross-border surrogacy, the woman who gives birth is considered the legal mother, even if she has declared that she does not wish to exercise parenthood. It is considered document forgery if the names of the Danish mother and father are on the birth certificate. Adoption (which can take place only when the child is 2½ years old) is necessary to acquire legal parenthood (IPOL, 2013).

The analysis of the European Court of Human Rights’ case law shows that Strasbourg is playing a decisive role in affirming the legitimacy of cross-border reproductive care, by promoting the recognition of the right to respect for family life of parental nucleus constituted abroad according to domestic law. The Court has in fact recently recognized the obligation of the States to protect private and family life for family units that exist *de facto* and that were formed abroad using ART techniques that were forbidden in their country of origin. The accent is on the best interests of the child, and thus on the respect of a factual parental relationship that already exists.

In the decision *Mennesson v. France* and *Labassee v. France* (both of June 26, 2014), the Strasbourg Court affirmed that in cases where a couple overcame the national ban on surrogacy by expatriating to use surrogacy arrangements and the biological father was the husband in the couple, the discretion of the State was limited by the existence of a genetic bond between the child and the father. According to the European judges, the child’s right to respect of private life imposed recognizing at the very least the bond of parenthood as regards the biological parent.

In the decision *Paradiso and Campanelli v. Italy* (January 27, 2015), instead, Italy was condemned for having removed a child, born in Ukraine, from the Italian couple that commissioned the birth using a surrogate mother and lacking any genetic bond with either member of the couple. According to the Court, in fact, the existing *de facto* parental bond should have prevented the State from holding that in and of itself going abroad for reproductive care techniques that are forbidden by domestic law constituted unsuitable parental behaviour such as to justify removing the child.

The Hague Conference of Private International Law will probably move in the same direction. Indeed, it is exploring the possibility of an intervention with the aim of ensuring the right to the cross-border continuity of the family status acquired abroad to children conceived abroad through ART (Permanent Bureau Hague
In addition to that, the comparative analysis of regulations and judicial and administrative practices in the various legal systems appear to confirm the trend to recognition and underscores how often complete changes of attitude in case law, or in any case decisions to open things up, contain multiple references to European principles and in particular to Strasbourg’s judgments.

Dutch case law concerning transnational matters of surrogacy is an excellent example in that the right to respect for family life enshrined in Article 8 of the ECHR is repeatedly invoked to guarantee juridical recognition of the relationship at least with the biological father (see the case law cited in European Parliament, 2013: 312). For example, in a peculiar case of cross-border “reproductive care”, the surrogacy took place in the Netherlands among Dutch citizens and the surrogate mother gave birth in France, taking advantage of the right guaranteed by French law to remain anonymous and not be mentioned in the birth certificate. The Dutch Court recognized the family bond between the child and the biological father who commissioned the birth, invoking to interpret domestic law the case of the European Court on Human Rights on Article 8 (Rechtbank ’s-Gravenhage, September 14, 2009, cit. in European Parliament, 2013: 312).

In Italy, a decision of the Appeals Court of Turin admitted the registration of a birth certificate of a child conceived and born in Spain with donor insemination from two women. The first woman, a Spanish citizen, carried the pregnancy, while the second woman, an Italian national, had furnished the egg that was inseminated with the sperm of an anonymous donor and implanted in the uterus of her partner. In the decision, the Turin Court expressly stated that in the light of Strasbourg case law, it may not be held that there is a principle of public policy (or ordre public) which includes the heterosexuality of parents and therefore excluding the registration of the Spanish birth certificate, but it is precisely the public policy, interpreted according to the case law of the European Court of Human Rights, that imposes “to guarantee a legal recognition of a de facto situation that existed for years, in the exclusive best interests of a child raised by two women” In addition to this, Italian criminal case law denies acknowledging the crime of false declaration about personal identities and qualities in the request to Italian authorities to register a birth certificate of a child conceived or born abroad of a surrogate mother recalling precisely the judgements from Strasbourg: “following the two decisions of June 26, 2014 of the European Court for Human Rights (our italics), the method of conceiving offspring has become irrelevant, as a prerequisite for recognizing maternity or paternity, thus the above mentioned request for registration, while not a true copy, is however unsuitable to weaken the interest that is legally protected, the truth of the statement, and constitutes an innocuous forgery which is not punishable” (Court of Varese, decision of October 8 – November 7, 2014 in www.articolo29.it).

In Spain, the registrations of birth certificates of children conceived abroad through surrogacy by gay couples have been performed for years. However, the Supreme Court would appear to have changed course: with decision February 6, 2014, the judges denied the registration of a birth certificate for two children born in California to a couple of Spanish men who used a surrogate mother. The reason used is the fact that this practice goes against public policy, deriving from the violation of the explicit ban on surrogacy that is in Spanish law (and this case law was reiterated in a decision on February 2, 2015). In any case, the Spanish Ministry of
Justice suggested civil status officials to continue with the registrations and moreover announced a legislative reform that would provide expressly for such registrations. 45

In Hungary, there is a legal precedent in a case of (probable) surrogacy for a couple of Hungarian citizens in Ukraine that allows the registration of the Ukrainian birth certificate indicating the married couple as the parents. 46 The motivation is double: on the one hand, the verification that the man is the biological father of the child; on the other, there is a treaty between Hungary and Ukraine about legal assistance that imposes reciprocally recognizing birth certificates.

In Croatia there is no legal precedent on the subject. In any case, according to articles found in the Croatian media, the usual practice in such cases is that hospitals and clinics providing surrogacy services, mostly in Russia and Ukraine, put the name of the intended mother as the child’s mother, thus enabling the intended parent(s) to claim legal parenthood and the child to acquire Croatian citizenship.

Nevertheless, while this cross-border recognition of the right to respect for family life should be welcomed in general, the risks of recognizing tout court family models created abroad to overcome domestic legal prohibitions cannot in any case be discounted. For example, a generalized affirmation of the lawfulness of surrogacy discriminates on the basis of wealth as to who can exercise the right of becoming a parent and may translate into the exploitation of women from impoverished economic conditions. This latter aspect is underscored in a recent resolution of the European Parliament according to which “the Parliament condemns the practice of surrogacy, which undermines the human dignity of the woman since her body and its reproductive functions are used as a commodity; considers that the practice of gestational surrogacy which involves reproductive exploitation and use of the human body for financial or other gain, in particular in the case of vulnerable women in developing countries, shall be prohibited and treated as a matter of urgency in human rights instruments”. 47 From this viewpoint, some countries continue to make ample use of the public policy clause in the case of surrogacy. Dutch courts, for example, have refused to recognize Indian and Californian birth certificates that indicate the commissioning couple as the parents because it goes against public policy on the basis of the principle that, in the best interests of children and of pregnant women, the mother is the woman who gives birth. The above-mentioned European case law would appear in any case to shatter even these limits in the interest of the minor child.

V. CONCLUSIONS

The notion of “family” is an excellent testing ground for reflecting on interactions between Europe and national legal systems, and more in general, on the connections between the on-going transformation of family patterns, family law and family policies. In fact, what was illustrated in the preceding sections demonstrates the circularity of exchanges between the European level and the national levels, as well as between family models, law and policy.
If until a few years ago the adage “what a family is, no one knows,” might have been a shared opinion, nowadays it is no longer true. Today, it is precisely the European Convention on Human Rights and EU law that furnish national legal systems with the minimal but precise indications as to which horizontal and vertical relationships legally build a "family" and therefore the individual right to respect for family life. This is to assure that all countries guarantee fundamental rights and liberties, specifically the principle of non-discrimination, the freedom of movement, the liberty to exercise reproductive choice without unjustified interference. In identifying a minimal family status on a European level, what plays a fundamental role ‘from bottom up,’ as has already been illustrated, is the consensus among the national legal systems. The progressive spread of the same consensus, in fact, reduces the margin of appreciation traditionally recognized to the Member States on this matter (see in general Dzehtsiarou, 2015). In any case, this process is not painless, as has been demonstrated by the opposition from various political parties toward different family forms in the last European electoral campaign. 

This article demonstrates that the legal notion of family is the fruit of a renvoi of the law itself to society and to its on-going social and cultural transformations. The trend emerges in law to anchor the notion of family more and more to factual data such as stable cohabitation, reciprocal economic solidarity, the existence of stable and recognized bonds, the fact of procreation, more than to the existence of a legal formalization such as marriage or registered partnerships. Simulated marriage is emblematic of the negative side just as de facto cohabitations are emblematic on the positive side. Also, another positive sign is the progressive recognition by case law of the need to protect the family life of the child conceived following procreative ‘tourism’.

Nevertheless, this article shows also that in the case of social policies, above all in the case of rights linked to work and welfare, just as in the case of tax law, we can observe national variations in the Member States in recognizing benefits and the lack of convergence among the countries and policy areas, with barriers to full European citizenship for some family forms.

This article also shows that the visibility of ‘other’ family models through transnational and intra-European mobility and in particular through ‘marriage tourism’ and cross-border reproductive care practices influences domestic laws ‘from the bottom up’. This has two import implications.

First, it calls upon public opinion and courts to rethink their own cultural canons on the subject of family in the light of family changes and new needs for individual justice. In particular, the effect is to socially and culturally set some principles through an evolution in interpretation that is in compliance with constitutional principles and European Law. Principles such as the one according to which parental responsibility derives from child’s birth, independent then for example of the circumstance of the existence (or not) of a bond of marriage between two parents; the principle according to which marriage is not aimed at procreation; the possibility of a multiple parenting, i.e. the possible co-presence of various parental figures in the best interest of the child. Second, transnational reproductive care practices, as well as a plurality of family models, forces courts, social scientists and policy makers to think beyond the nation-state border.
In conclusion, what is a family in Europe? Family is still a shifting concept. It is difficult to speak of one single family notion in the EU, just as it has been always difficult to define family spatial or relational boundaries within a national context. The bottom-up process seems to indicate that the main essence of the EU family cannot be found in one or even a few supranational fixed normative models. Rather, its essence has to be identified in reciprocal exchanges, in solidarity and in sharing of its own components, in the “doing” and in the “making” of the family, as the result in part of transnational family practices and in part of the results of the growing role of EU law in the circulation of legally recognized families.

VI. POLICY IMPLICATIONS AND LINK TO OTHER bEUcitizen DELIVERABLES

As far as policy implications of this article are concerned, it shows that Europe plays a growing role in removing the barriers faced by “different family forms” in their own country and when moving or travelling within the European Union. However, some barriers arise from the narrow scope of protection afforded to certain rights, specifically, the right to family life in some of the Member States which ban certain individuals or certain couples from “marriage” or from accessing ART or adoption, as shown by the documented increasing phenomena of “fertility tourism”. Cross-border reproductive care raises important ethical and policy issues, since only individuals and couples, same-sex or heterosexual, belonging to middle and higher social classes can afford long and expensive travel abroad.

The same issue of social inequalities among children, and the not respect for the fundamental principle of the best interests of the child, arises when national public policy considerations prevent the legal recognition of families of children born abroad using surrogacy in States that do not allow surrogate motherhood.

The main dynamic of reconfiguration of EU citizenship which emerges from this article strongly converges with the findings of other deliverables of bEU citizen.

The empirical evidence contained in this article shows, for instance, that, similarly to the results within the same WP, deliverable 9.4 - investigating the attitudes of the young on social and civil rights for family members and towards different family forms - civil and social rights related to family issues within these Member States tend to be polarized between more traditional countries (i.e. Italy, Croatia and Hungary) and less traditional ones (Spain, Netherlands and Denmark). The main results set out in this article (D 9.8) match those of the deliverables of WP7 (on civil rights) in the part where empirical evidence from this article converges with the finding of deliverables 7.1 and 7.2 that the rights of EU citizens in particular the right to family life and recognition as family members closely depend on where they live.

On the other hand, this article also shows that citizens attempt to expand their family life options and their family life aspirations with the help of EU law, as shown in D.7.2 and D 7.1 in the implementation and enforcement of civil rights. Moreover, this article shows that EU and international law, as well as the European
Convention on Human Rights as interpreted by the European Court for Human Rights, have substantially reduced the autonomy of national jurisdictions in recognizing ‘other’ types of family forms.

In regard to the more general concept of EU citizenship, this article shows that when EU citizenship is related to the construction and definition of the family dimension of life, it does not refer to citizenship as a bounded concept like national citizenship, or as a holistic and coherent concept, but rather as a sign of unbounded forms of citizenship: that is, rights are granted not to members of a certain community but according to their status as individuals (citizenship based on personhood) (see D 2.2 p.7). This emerges more clearly in the case of transnational practices of “doing” family, looking at both the phenomena of “marriage” and “procreative tourism” and to the recent jurisprudence in this field.
REFERENCES

Baratta, R. (2004), Scioglimento e invalidità del matrimonio nel diritto internazionale privato, Milan: Giuffrè
Council of Europe Family Policy Database on marriage (http://www.coe.int/t/dg3/familypolicy/Source/4_1_i%20Legislation%20on%20marriage.pdf) and cohabitation (http://www.coe.int/t/dg3/familypolicy/Source/4_1_ii%20Legislation%20on%20cohabitation.pdf);
Daly, M. and Scheiwe, K. (2010), Individualisation and personal obligations – social policy, family policy, and law reform in Germany and the UK, 24 International Journal of Law, Policy and Family 177-197.
Europe Rainbow Map - Index (http://www.ilga-europe.org/home/publications/reports_and_other_materials/rainbow_europe).


Lewis, J. and Giulareli, S. (2005), The adult worker model family, gender equality and care: the search for new policy principles and the possibilities and problems of a capabilities approach, in 34 *Economy and Society* 76-104


Permanent Bureau Hague Conference on Private International Law (2016), *Background note for the meeting of the experts’s group on the parentage/surrogacy project*, in www.hcch.net


The article is the result of a fruitful collaboration between the co-authors. However, the final version of section I and II can be attributed to Manuela Naldini and Section III, IV and V to Joëlle Long. The authors want to thank Chiara Saraceno, Pilar Jiménez Blanco, Orsolya Salát, Rosy Musumeci and Arianna Santero for their useful comments to a previous version of this article. This article could not be written without the support provided within bEU citizen project (Grant Agreement N° 320294 SSH.2012.1-1) and without the contributions of the partners involved in WP9.

The full questionnaire and the names of partners and people involved in completing the questionnaire are available at http://beucitizen.eu/deliverable 9.8.

Among the countries involved in the inquiry there was also Israel, that presented characteristics that were peculiar as family law is of a religious matrix (thus there is no civil marriage or divorce) and is focused on a religious marriage, despite “alternative” family models represent almost half the families. Israel was excluded from this paper as it focuses on the EU.

Art. 39 Constitution of Spain, article L par. 1 Constitution of Hungary, Art. 62 Constitution of Croatia, art. 29 Constitution of Italy.

Art. 29 par. 1 Italian Constitution, art. L par. 1 Hungarian Constitution, modified 2013.


Art. L par. 1 Hungarian Constitution and Art. 62 Croatian Constitution.

65% of the votes were in favour (quorum of 37.9%).


In Spain simulated marriage is declared null and void and thus does not produce effects for the purpose of immigration law (Art. 17 n.1, litra a of the Organic Law 4/2000 of January on Rights and Freedoms of Foreigners in Spain and their Social Integration). In Italy immigration law (Art. 30 para 1 Consolidated Act on Immigration) provides that the residence permit for family reasons may be revoked when it is ascertained that the marriage celebrated in Italy with a foreign person was not followed by living together. In Hungary, according to Section 14 2) of Act I of 2007, the permission of the third country national to stay in the country expires in the case that the family relationship was created in order to acquire a residence permit.

In Spain there is not a national law on registered partnership. The single regions (Comunidades Autónomas) have their own laws with some differences between them.

In Hungary with the registered partnership act n° 29 of 2009; and in Croatia the Same-Sex Life-Partnership Act came into force on July 28, 2014.

While we are writing this article, in Italy the law on civil unions is in the approval phase, in order to give legal recognition to homosexual and heterosexual couples, but the right to adoption including stepchild adoption is excluded from the rights given same-sex couples.


This is a topic that has not been extensively studied, on this topic see the pioneering work of Miller and Warman 1996. More recently, the work of Daly and Scheiwe, 2010, op. cit. And at least in part, Keck and Saraceno 2010.


An exception instead is, for example, the Staff Regulations of officials that since 2004 has provided for recognizing equally marriages and civil unions (Art. 1 quinquies), should the unmarried couple prove not to have access to marriage in the member state (for ex. because of homosexuality): see Regulation (CE, Euratom) n. 723/2004 of the Council, from March 22, 2004. The reason is nevertheless evident: in this case there is no contact with national laws.

Article 81(3) on the Treaty on the Function of the European Union.

Point 2 of Article 2. Analogously, art. 4 of the Directive 2003/86/CE of 22 September 2003 relating to the right to family reunification which states that Member States “may authorize the entry and residence... of the unmarried partner” and that they “may decide that registered partners are to be treated equally as spouses with respect to reunification”.

Article 10 Regulation n. 1259/2010 of December 20, 2010 relating to the implementation of reinforced cooperation in the area of law applicable to divorce and separation.

Ivi, art. 13.

European Court of Justice, cases C-363/12 and C-167/12, both of 18th March 2014.

In fact, some nationalistic political currents during the last electoral campaign for European elections strongly criticized the European Union as actively involved in the spread of a gender ideology which distorts “the traditional family”. On October 15, 2015, for example, at the European Commission a ‘European Citizens’ Initiative’ (ECI) was registered that aimed to gather the signatures of European citizens for a “Council Regulation to protect marriage and family” that specified that “in determining the meaning of any legal act pertaining to EU law, or of any ruling, regulation, or interpretation of the European Commission or of any EU agencies, (a) the word ‘marriage’ means a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to person of the opposite sex who is a husband or a wife”.

See Schalk and Kopf vs. Austria, cit., par. 27 ss. For a theoretical view of comparative law method as interpretative tool of the Convention see Mahoney and Kondak, 2015, 121.

European Court of Human Rights, Karner v. Austria, judgement July 24 2003, par. 41

European Court of Justice, case C-117/01 of January 7, 2004.


See European Court of Justice, case Garcia Avello C-148/02, October 2, 2003 and European Court of Justice, case Grunkin Paul C-353/06, October 14, 2008.

Reg. n.2201/2003, that substituted Reg. 1347, imposes automatic recognition of provisions that fall in the area of application in countries of the EU (Art. 21 comma 1°, art. 24) and the direct registration of said provisions in the marriage and birth registries (Art. 21 comma 2°), imposing numerous restrictions should there be refusal to recognize the provisions.

The analogy is almost total in the horizontal couple’s relationship. The only exception, children’s adoption, concerns the vertical relationship between parents and offspring.

Article 14 ECHR and article 21 Charter of Fundamental Rights of the EU.

See Article 3, par. 2, Treaty on the European Union and Art. 4, par. 2, letter a), and Articles 20, 26 and 45-48 of the Treaty on the Functioning of the European Union.

Commission for civil liberties, justice and internal affairs, Report on the EU schedule against homophobia and discrimination linked to sexual orientation, 7 January2014.

We prefer to use this latter term even if it is not easily understood, because the term “reproductive tourism ”evokes images of a carefree vacation and is inappropriate for the perception that the protagonists of this migratory project have. It is not in fact a choice, but an obligatory expatriation that is experienced in order to protect one’s reproductive health (on this point see M. C. Inhorn and P. Patrizio, Rethinking reproductive
“tourism” as reproductive “exile”, in Fertility and Sterility, volume 92, issue 3, pp. 904–906). On this point also see Harper et al. 2015.

39 On the basis of the most recent information available Europe made in 2004-2005 the largest contribution of aspirations (56%), followed by Asia (23.3%) and North America (15.4), p. 367. See Zegers-Hochschild et al. 2014,p. 367.


41 See for Spain Article 10 of Law 14/2006, of May 26, sobre Técnicas de Reproducción Humana Asistida; for Italy Article 4 comma 3° and Article 12 comma 6; in Hungary in 2002, the section which earlier made altruistic surrogacy arrangements available was repealed of Act No CLIV of 1997 on health care; in Croatia see article 24 of the Medically Assisted Reproduction Act.

42 Three new cases are pending before the European Court of Human Rights. Laborie v. France deals with the non-recognition of Ukrainian birth certificates in France with respect to two children born to a surrogate. Foulon v. France and Bouvet v. France concern the non-recognition in France of the acknowledgment of paternity of intending fathers of children born through surrogacy in India.


44 ibidem.

45 However, this legislative reform was never carried out, and the legal situation in Spain is still uncertain.

46 The decision is cited by C. István Nagy, 2013: 183.


48 This topic is part of the analysis undertaken in the same research project which this article stems from (bEu citizen project). For further analysis on extreme-right and populist parties’ discourses and their (potential) opposition to alternative family forms in the last EU electoral campaign, see deliverable 9.7 in http://beucitizen.eu/deliverable 9.7.

49 In the sense of a recognition of the pre-juridical nature of the ‘family’ and that family pre-exists to the State are Article 29 comma 1 of the Italian Constitution of 1948 which defines family as a “natural society” and the choice of the Spanish Constitution not to define the family, despite the many references to the need to protect it (in the Spanish doctrine Díez Picazo, 1984: 21, in the Italian doctrine A. C. Jemolo, 1949: 57 according to which “the family is an island that the sea of law can only laps”).
ANNEX 1: QUESTIONNAIRE 9.8 DIVERSE FAMILY FORMS AND REPRODUCTIVE RIGHTS

By
Joëlle Long and Manuela Naldini (University of Turin)

version sent to partners 28/10/2014

Premise

Family is a shifting concept. What it means to be a member of a family and what is expected of family relationships, as well as the language used to describe them, vary over time and place. Although the term "family" continues to be widely used to refer to an enduring core, or a fundamental social unit, it is impossible to find a universally agreed definition that can be applied across countries. In addition, the extent of the "family" can vary even within the same State depending on the context in which it is invoked (e.g. "family" inheritance; "family" obligation of support; "family" allowances).

Despite the fact that family law has traditionally been excluded from the EU competences, EU law has been playing an increasing role in the circulation of legally recognized family forms. Indeed, since EU citizenship is based on freedom of movement and on the protection of individual and social rights, there is a growing pressure for some degree of homogeneity in the acknowledgement of different family forms, both across and within countries.

To be able to consider all these issues, it seems appropriate to contemplate both family law (and therefore existing laws on marriage, registered partnership, "de facto" union, children's adoption, medical assisted reproduction) and social legislation and social policies. Thus, it will be possible to reconstruct a pragmatic notion of "family" as group of persons to whom the State recognizes a minimum preferential treatment (i.e. the right to respect for "family life") because of the social value of the relationships that bind its members.

Aim of the questionnaire

The questionnaire has three main objectives:

1) To understand if and how in the different countries involved in WP9 "family" is defined both in family law and in social policies, and how convergent (or divergent) is the notion of family emerging from these two fields;
2) To find out, within the family changing context, which relationships legally build a "family", and whether there are explicit bans on granting a legal family status to specific relations;
3) to individuate the barriers “diverse family forms”, such as, unmarried couples, same sex marriages and rainbow families, face when living, moving or travelling within the European Union.
1. Defining families

1.1 Is there one or more legal definition of family in your country? If so, please report the definition and specify the relevant legal act (date, number and title of the law and article):
- Constitution,
- civil law,
- criminal law,
- social security law (e.g. family allowances, housing benefits, tax-allowances, family leave, etc.)
- other

[e.g. in the Italian legislation one can find different definitions of the family, although the only legal definition of family is the one provided for civil records purposes. However, there are specific rules which recognize differentiated legal effects to different family forms: e.g., heterosexual cohabiting partners are not default legal heirs of each other and cannot adopt, but may have access to medically assisted procreation]

1.2 Are there specific definitions of household (people who occupy a housing unit) /family for statistical reasons (administrative reasons, census, etc.)? Which are the main differences (if any) between the legal definition of family unit and household definition?

2. Marriage and Partnership
In responding to question 2.1 and 2.2, please consider the information on Croatia, Denmark, Hungary, Italy, the Netherlands and Spain already present in The Council of Europe Family Policy Database on marriage (http://www.coe.int/t/dg3/familypolicy/Source/4_1_i%20Legislation%20on%20marriage.pdf) and on cohabitation (http://www.coe.int/t/dg3/familypolicy/Source/4_1_ii%20Legislation%20on%20cohabitation.pdf) of the Council of Europe and just give updates or indicate mistakes.

2.1 What forms of partnership are recognized in your country? [E.g. marriage, registered partnership, cohabitation]

2.2 Is there any legal difference of effects between married, cohabiting couples (and registered partnerships) when it comes to (if so, please indicate the differences):

- Taxation
- Housing subsidies
- (legal) parenthood
- Naming of the child
- Inheritance rights
- Division of assets in case of dissolution of the relationship/divorce
- Other

2.3 Some countries provide social policies (social security benefits, such as, survivor’s pension, unemployment benefits, family allowances or tax allowances) or arrangements which take into account the family dimension. If so, please explain how does it work in your country for the main benefit schemes (pension, unemployment benefit, family benefits, taxation, housing policies) and point to any limitations to what is provided, paying special attention to:

- any (legal) differences made between married and unmarried couples;
- any (legal) differences made between homosexual and heterosexual couples.
- any (legal) differences between individuals/couples with or without children of a certain age?

2.4 Are there any (financial) incentives and / or premiums offered by the state in relation to family formation (wedding or partnership registration) in your country?

<table>
<thead>
<tr>
<th>Premiums/incentives</th>
<th>Wedding</th>
<th>Legalizing a relationship</th>
</tr>
</thead>
<tbody>
<tr>
<td>No incentives</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Incentives</td>
<td>Amount</td>
<td>Amount</td>
</tr>
</tbody>
</table>

2.5 Which is the role played by EU law and by the comparison with other EU countries in your country political debate and in the approval of legislative changes for the recognition of rights for diverse family forms? If possible, give some examples.

2.6 If your country does not allow registered partnerships and same sex marriages, could still the latters, when obtained in another (EU or non EU) country, have legal effects in the domestic legal system (for instance with regard to immigration issues, i.e. entry and residence in the State of the non EU citizen spouse)? Would it be possible for a country national married abroad with a same sex partner to register his or her union in the State or would it be refused (for instance, the vast majority of Italian courts reject the appeals by homosexual couples against the denials of registration by administrative authorities)? (If applicable, mention any relevant domestic case law)

Cases: Barriers to family life in practices
3. Parenthood and Reproductive Rights

3.1 How does your country regulate access to medically assisted reproduction (and surrogacy)? For instance, is it possible for:

- Single parents?
- Cohabitating (not married) couples?
- Same-sex couples?
- Are there age restrictions? If yes, please explain.

In responding to this question, please consider the information on Denmark, Italy, Hungary, the Netherlands and Spain in the ESHRE "Comparative Analysis of Medically Assisted Reproduction in the EU" (http://ec.europa.eu/health/blood-tissues-organs/docs/study_eshre_en.pdf), and on Denmark, Croatia, Italy, Israel, Hungary, the Netherlands and Spain in Directorate General For Internal Policies, "A Comparative Study on the Regime of Surrogacy in EU Member States" (http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET%282013%29474403_EN.pdf) and just give updates or indicate mistakes.

3.2 If your country does not allow surrogacy, could the legal parenthood of the baby so born abroad by a country national be recognized in the domestic legal system? Would it be possible, for instance, to register the birth certificate of the child or would it be refused? Would the child acquire national citizenship? Would he/she be granted a passport?

3.3. Would it be possible for the same sex partner of the biological parent to adopt the child conceived abroad through medically assisted procreation? [Eg. the Juvenile Court in Rome recently agreed to grant to the lesbian partner of the biological mother the adoption of a baby girl born in Spain through medically assisted reproduction (until July 2014, in Italy heterologous fertilization was legally banned)].

3.4 Do couples in your country receive financial assistance for IVF or other fertility treatments? If so, through what type of funding? Please explain what costs are covered and under what conditions (e.g. are these costs only covered for heterosexual couples? Are there other limitations?)

3.5 Are there data available on the number of couples going abroad for any kind of reproductive assistance? (Please, indicate the main reasons and the main consequences of this practice)

3.6 How does your country regulate adoption practices? Is it possible for:

- Single parents to adopt?
- Cohabitating (not married) couples to adopt?
- Homosexual couples to adopt?
- Are there age restrictions on adoption? If yes, please explain.

In responding to this question, please consider the information on Denmark, Hungary, Italy, the Netherlands and Spain in the “Comparative Study Relating to Procedures for Adoption among Member States of the Eu. Practical Difficulties Encountered in this field by European citizens” (http://ec.europa.eu/civiljustice/news/docs/study_adoption_legal_analysis_en.pdf) and just give updates or indicate mistakes.
3.7 If your country does not allow adoption by same-sex spouses or by registered partners or by de facto cohabitants, would such an adoption made abroad have legal effects in the domestic legal system?

3.8 Are there any enlargement or on the contrary restrictions in the use of parental leave whether the parent/s is/are:

- Single parents?
- Cohabitating (not married) couples?
- Homosexual couples?
- A parent living in a different/another country

3.9 Are there any public childcare services in your country? Are there any difference in the access and availability of those services if the claimants are:

- Single parents?
- Cohabitating (not married) couples?
- Same-sex couples?
- Foreigners, but resident in the country

3.10 Are there any type of family benefits (i.e. child allowances, birth allowances) related to children in your country? Are these universal or means-tested? Are there any differences in the access to those benefits if the claimants are:

- Single parents?
- Cohabitating (not married) couples?
- Same-sex couples?
- Foreigners, but resident in the country

Cases: Barriers to family life in practices

LEGAL ARRANGEMENT/LAW/POLICY REPORT

RESEARCH REPORT/PUBLICATION(S):
ANNEX 2: PROOF OF SUBMISSION TO PEER REVIEWED JOURNAL
Dear Prof. Eekelaar,


The article was written with a sociologist colleague, Prof. Manuela Naldini, within the bEU citizen project. It is not under consideration for publication elsewhere nor has it been published previously.

I am, of course, available at any time to answer questions and, doubts you may have about the paper. I can be reached at joelle.long@unito.it, tel ++39 011 6709448, Law Department, University of Turin, Lungo Dora Siena 100 A, 10153 Torino.

I thank you in advance, also on behalf of Manuela Naldini, for your time and consideration.

Sincerely,

Joëlle Long

Dipartimento di Giurisprudenza
Università degli Studi di Torino
Campus Luigi Einaudi, Lungo Dora Siena 100 A, 10153 Torino
D3, II piano, stanza 02
tel. 011 670 9448
fax 011 670 2559